(1)

FILED

No. __-____ 991857 MAY 19 2000

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SMITH COGENERATION INTERNATIONAL, INC.,

Petitioner,

—against—

SMITH/ENRON COGENERATION LIMITED PARTNERSHIP, INC., ENRON INTERNATIONAL C.V., ENRON DEVELOPMENT CORP., ENRON RESERVE I B.V., ATLANTIC COMMERCIAL FINANCIAL B.V., and TRAVAMARK TWO B.V.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOSEPH D. BECKER
Counsel of Record
BECKER, GLYNN, MELAMED
& MUFFLY LLP
299 Park Avenue
New York, New York 10171
(212) 888-3033

RICHARD N. CHASSIN
ZEB LANDSMAN
KEVIN OLSON,
Of Counsel

Counsel for Petitioner

4 copies

QUESTION PRESENTED

In a proceeding under the Federal Arbitration Act, was the Second Circuit right to hold that federal common law, rather than state law (including state choice-of-law rules), determines that an absolute assignment of an interest in a foreign limited partnership does not impair an assignor-partner's right to enforce the arbitration clause of the partnership agreement?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties.

Pursuant to Rule 29.6, we advise the Court that the petitioner does not have any parent corporations and there are not any publicly held companies that own 10% or more of its stock.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	5
I. THE DECISION BELOW CONTRADICTS TWO LINES OF AUTHORITY	6
A. In FAA Cases, State Law Governs Ordinary Contract Issues	6
B. Even in Federal Question Cases, State Law Not in Clear Conflict With Federal Law Governs Substantive Issues	8
II. THE SECOND CIRCUIT IS IN CONFLICT WITH OTHER COURTS OF APPEALS	9
III. THE RELATION OF FEDERAL TO STATE LAW WAS MISCONCEIVED	10
CONCLUSION	14

TABLE OF AUTHORITIES

Cases	PAGE
Aaron Ferer & Sons, Ltd. v. The Chase Manhattan Bank, 731 F.2d 112 (2d Cir. 1984)	11
Atherton v. FDIC, 519 U.S. 213 (1997)	8, 9, 10
Clark v. Kelly, 1999 Del. Ch. Lexis 148 (Del. Ch. June 24, 1999)	13
Doctors Assoc., Inc. v. Casarotto, 517 U.S. 681 (1996)	6, 7
Edgar v. MITE Corp., 457 U.S. 624 (1982)	10
Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)	6, 9
Fidelity Fed. Savings & Loan Assoc. v. De la Cuesta, 458 U.S. 141 (1982)	12
First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995)	6, 7
Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126 (7th Cir. 1997)	9
Hauenstein v. Lynham, 100 U.S. 483 (1880)	12
Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487 (1941)	12 n.6
Mertz v. Seibel Realty, Inc., 696 N.Y.S.2d 598 (4th Dept. 1999)	5 n.4
Paladino v. Avnet Computer Tech., Inc., 134 F.3d 1054 (11th Cir. 1998)	9
Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997)	9

PAGE

Perry v. Thomas, 482 U.S. 483 (1987) 6, 7

Riley Mfg. Co. v. Anchor Glass Container Corp., 157 F.3d 775 (10th Cir. 1998) 7

Rosenberg v. Merrill Lynch, 170 F.3d 1 (1st Cir. 1999) 9

Rosenmiller v. Bordes, 607 A.2d 465 (Del. Ch. 1991) 10, 13

Schiffartsgesellschaft Detlev von Appen GmbH v. Voest Alpien Intertrading GmbH, [1997] 1 Lloyd's Rep. 179 (Q.B.), *appeal dismissed*, [1997] 2 Lloyd's Rep. 279 (C.A.) 11

United States v. Bestfoods, 118 S.Ct. 1876 (1998).. 5 n.4

Webb v. Investacorp, Inc., 89 F.3d 252 (5th Cir. 1996) 9

Wyss v. Albee, 469 N.W.2d 247 (Wis.Ct. App. 1991) 11

Statutes

9 U.S.C. § 203 ..... 2, 4

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1652 ..... 2, 9

N.Y. Partnership L. § 121-901 (McKinney Supp. 2000) 3, 10

Turks and Caicos Islands, *Limited Partnership Ordinance and Subsidiary Legislation* § 6(4) (Rev. ed. 31 Oct. 1997) 3, 4, 11

PAGE

Vernon's Ann. Tex. Civ. Stat. art 6132a-1,
§§ 9.01(a), 7.02(a)4) 13

Other Authorities

3 E. Allan Farnsworth, *Farnsworth on Contracts*
§ 11.3 (1998) 11

IN THE

Supreme Court of the United States

No. __-____

SMITH COGENERATION INTERNATIONAL, INC.,

Petitioner,

—against—

SMITH/ENRON COGENERATION LIMITED PARTNERSHIP, INC., ENRON INTERNATIONAL C.V., ENRON DEVELOPMENT CORP., ENRON RESERVE I B.V., ATLANTIC COMMERCIAL FINANCIAL B.V., and TRAVAMARK TWO B.V.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Smith Cogeneration International, Inc. ("SCI"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals (Pet. App. 1a-22a) is reported at 198 F.3d 88. The Order of the Court of Appeals (Pet. App. 23a) denying SCI's petition for panel rehearing and for rehearing en banc is unreported.

The Judgment of the United States District Court for the Southern District of New York (98 Civ. 6079 (RCC)) is unreported.[1]

JURISDICTION

The Opinion and the Judgment of the Court of Appeals were entered December 8, 1999. SCI's timely petition for rehearing, with suggestion for rehearing en banc, was denied by Order entered February 23, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Federal Arbitration Act § 203 (9 U.S.C. § 203) provides:

> An action or proceeding falling under the Convention[2] shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

The Rules of Decision Act, 28 U.S.C. § 1652, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

---

[1] Judge Richard C. Casey ordered arbitration from the bench, without formal opinion, on November 6, 1998. The final Judgment was entered December 22, 1998.

[2] The reference is to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, reprinted after 9 U.S.C.A. § 201 (1999).

Section 121-901 of the New York Partnership Law (McKinney Supp. 2000) (Revised Limited Partnership Act) provides:

> Subject to the constitution of this state, the laws of the jurisdiction under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners.

Section 6(4) of the Limited Partnerships Ordinance of the Turks and Caicos Islands provides in pertinent part as follows[3]:

> Subject to any express or implied term of the partnership agreement to the contrary . . .
>
> > a person may with the consent of the general partners assign his partnership interest and, if he does so, the assignee shall become a limited partner with all the rights of the assignor, notwithstanding the absence of consent of the existing limited partner or any of them.

STATEMENT

Pursuant to a 1994 partnership agreement, SCI joined respondents in a limited partnership organized under the Limited Partnerships Ordinance (the "Ordinance") of the Turks and Caicos Islands (the "Islands") for the purpose of distributing electricity in the Dominican Republic. The Islands are a dependency of the United Kingdom.

Before 1996, all the respondents assigned away, absolutely, their respective interests in the partnership to several corporations with which respondents claim to have an unspecified degree of affiliation. The instruments of assign-

---

[3] Turks and Caicos Islands, *Limited Partnership Ordinance and Subsidiary Legislation* (Rev. ed. 31 Oct. 1997).

ment did not reserve arbitration rights to the assignor-respondents. Under § 6(4) of the Ordinance, respondents thereby ceased to be parties to the agreement or limited partners in the partnership.

In 1998, SCI filed suit against respondents in the courts of the Dominican Republic alleging various torts. The 1994 agreement included an arbitration clause calling for arbitration of disputes in New York City. Respondents, although no longer parties to the 1994 agreement, applied to the United States District Court for the Southern District of New York for an order compelling arbitration. The application invoked the District Court's jurisdiction under Chapter Two of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 203, asserting that the case fell under the international arbitration convention specified in § 203. (*See supra*, p. 2 n. 2). A judgment enforcing the arbitration clause was granted, and, on SCI's appeal to the Second Circuit, the judgment was affirmed. (Pet. App. 1a).

In both courts below, SCI contended that state law (including state choice-of-law rules), not federal common law, governed the effect of the assignments on the assignors' right to enforce the 1994 agreement, including the arbitration clause, and that application of the proper law would deny respondents' arbitration rights. The Second Circuit disagreed and disposed of the issue as follows (Pet. App. 15a):

> First, as this is a federal question case under 9 U.S.C. § 203 and not a diversity case, we see no persuasive reason to apply the law of New York simply because it is the forum of this litigation. See Corporacion Venezolana de Fomento v. Vintero Sales Corp. et al., 629 F.2d 786, 795 (2d Cir. 1980); Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F.Supp. 1229, 1235-37 (S.D.N.Y. 1992) (applying federal law to the question of whether a contract is enforceable in a case arising under the Convention); cf. Pescatore v. Pan Am. World

Airways, 97 F.3d 1, 12 (2d Cir. 1996) (noting that the law is unsettled when it comes to applying federal common law or state common law in non-diversity cases).

The panel went on to apply federal common law and FAA pro-arbitration policy to the preliminary issue whether the respondents validly retained a post-assignment right to arbitrate. Misusing veil-piercing and estoppel theories derived from federal cases and generalized contract principles, the panel held that the assignor-respondents were entitled to enforce the arbitration clause notwithstanding the assignments. (Pet. App. 17a-19a).[4]

REASONS FOR GRANTING THE WRIT

The writ should be granted because the decision of the Second Circuit to apply federal common law, rather than New York choice-of-law rules, to save the assignors' arbitration rights plainly contradicts rulings of this Court, made in two parallel lines of authority, that (i) state law governs peripheral issues of contract law in proceedings under the FAA, and that (ii) even in federal question cases, state law governs substantive issues in the absence of a plain conflict with federal law or policy. When applied, New York law includes choice-of-law rules; the rules select the Ordinance, and English law, to deny arbitration rights to the assignors.

---

[4] The purpose of veil-piercing was to find an agreement, and sustain jurisdiction, by showing that the assignors were alter egos of the assignees. That required showing that "the corporate form is misused to accomplish certain wrongful purposes. . . ." *United States v. Bestfoods*, 118 S.Ct. 1876, 1885 (1998). Respondents did not adduce such evidence. The Second Circuit found most significant one instrument of assignment where the same officer signed for assignor and assignee. (Pet. App. 18a). That is not a basis for piercing. *See, e.g., Mertz v. Seibel Realty, Inc.*, 696 N.Y.S.2d 598, 600 (4th Dept. 1999) (no piercing when two corporations have same officers and directors and one is landlord of other).

A decision by this Court on the issues should unify contradictory positions in courts of appeals, resolve the relation of the FAA to state law, and settle the point that, in non-diversity cases, state law governs issues not manifestly controlled by federal law.

I.

THE DECISION BELOW CONTRADICTS TWO LINES OF AUTHORITY.

First, this Court's recent decisions hold that, in proceedings under the FAA, preliminary issues of ordinary contract law affecting an arbitration clause are governed by state law. Second, in a line of modern cases that give effect to *Erie* doctrine, *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and the Rules of Decision Act, 28 U.S.C. § 1652, the Court has held that, in the absence of directly controlling federal law, state law governs substantive issues arising in civil actions even where (as here) the district court's jurisdiction over the subject matter is founded on a federal question.

The Second Circuit misunderstood: it was not at liberty to "see no persuasive reason to apply the law of New York simply because it is the forum of this litigation." (Pet. App. 15a). As in diversity cases, the Rules of Decision Act *obligated* the Circuit to apply that law precisely because New York was the forum.

A. In FAA Cases, State Law Governs Ordinary Contract Issues.

Beginning with *Perry v. Thomas*, 482 U.S. 483 (1987), and running through *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), and *Doctors Assoc., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996), the Court has pursued the line that, except for issues of arbitrability or the scope of arbitration clauses, state law must be given primacy

in determining ordinary contract issues that arise from such clauses in FAA enforcement proceedings.

In *Perry*, in the course of holding that the FAA preempted a California labor statute that undermined arbitration agreements, the Court noted that "state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." 482 U.S. at 492 n. 9 (emphasis in original). In *Kaplan*, the courts were directed to "apply ordinary state-law principles that govern the formation of contracts" to arbitration agreements. 514 U.S. at 944. And in *Casarotto*, while denying to Montana the right to discriminate against arbitration contracts, the Court reaffirmed *Perry*, adding that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [FAA] § 2." 517 U.S. at 687 (citing additional cases of similar tenor). Many courts of appeals now agree. (Point II). As one has said, "[w]hen the dispute is whether there is a valid and enforceable arbitration agreement in the first place, the presumption of arbitrability falls away." *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 770 (10th Cir. 1998) (citing *Kaplan*).

The issue here is embraced by these cases. Whether the absolute assignment of a limited partnership interest divests the assignor of contract rights, including arbitration rights, is a species of a genus of preliminary questions about contract validity and formation. Assignment questions are merely a variation on that theme. State contract law answers such questions. The Court should issue the writ to establish that proposition.

As will be seen in Point III, state law here means choice-of-law rules of New York that refer to the law of the Islands.

B. Even in Federal Question Cases, State Law Not in Clear Conflict With Federal Law Governs Substantive Issues.

The Second Circuit, in speaking of the "unsettled" state of the law in non-diversity cases (Pet. App. 15a), simply ignored the recent line of cases of this Court culminating in *Atherton v. FDIC*, 519 U.S. 213 (1997), holding that, even in federal-question cases, federal common law may not be used to "create" a "special federal rule of decision," unless "a significant conflict between some federal policy or interest and the use of state law [has first been] specifically shown." *Id.* at 218. The Court in *Atherton* used state law to impose a higher standard of care on wayward directors of a federally chartered bank, sued by federal receivers under a federal statute. The Court explained, *idem*, that

> "cases in which judicial creation of a special federal rule would be justified . . . are . . . 'few and restricted'." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87, 114 S.Ct. 2048, 2055, 129 L.Ed2d 67 (1994) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651, 83 S.Ct. 1441, 1445, 10 L.Ed.2d 605 (1963)). "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress," not the federal courts. *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68, 86 S.Ct. 1301, 1304, 16 L.Ed.2d 369 (1966). . . . Thus, normally, when courts decide to fashion rules of federal common law, "the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown." 384 U.S. at 68, 86 S.Ct., at 1304. Indeed, such a "conflict" is normally a "precondition." *O'Melveny, supra*, at 87, 114 S.Ct. at 2055. See also *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728, 99 S.Ct. 1448, 1458-1459, 59 L.Ed.2d 711 (1979); *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 98, 111 S.Ct. 1711, 1717, 114 L.Ed.2d 152 (1991).

Back of the cited cases is the Rules of Decision Act, 28 U.S.C. § 1652, and the historic doctrine that "there is no federal general common law." *Atherton*, 519 U.S. at 218 (quoting *Erie*, 304 U.S. at 78). These are fundamental propositions. The Court should make plain that they are not "unsettled."

II.

THE SECOND CIRCUIT IS IN CONFLICT WITH OTHER COURTS OF APPEALS.

The Second Circuit decision also contradicts the holdings of several other courts of appeals that have followed this Court's recent cases applying state law to the ordinary contract issues that arise in FAA enforcement cases. *See Rosenberg v. Merrill Lynch*, 170 F.3d 1, 19 (1st Cir. 1999) ("When deciding whether the parties agreed under the FAA to arbitrate a certain matter, courts 'generally . . . should apply ordinary state-law principles that govern the formation of contracts.' "); *Webb v. Investacorp, Inc.*, 89 F.3d 252, 258 (5th Cir. 1996) ("When deciding whether the parties agreed to arbitrate the dispute in question, 'courts generally . . . should apply ordinary state-law principles that govern the formation of contracts.' "); *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130 (7th Cir. 1997) ("In determining whether a valid arbitration agreement arose between the parties, a federal court should look to the state law that ordinarily governs the formation of contracts."); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 834 (8th Cir. 1997) ("Under the FAA, ordinary contract principles govern whether parties have agreed to arbitrate, principles that in this case are derived from Missouri law."); *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054, 1061 (11th Cir. 1998) (arbitration clauses "are interpreted according to ordinary state-law rules of contract construction").

The writ should be granted to unify the positions in the courts of appeals.

III.

THE RELATION OF FEDERAL TO STATE LAW WAS MISCONCEIVED.

In choosing to apply federal common law rather than New York law to the assignment issue, the Second Circuit ignored a statute of New York mandating that the law of the Islands must be applied to determine rights of assignor-partners in a limited partnership of the Islands. The Revised Limited Partnership Act, N.Y. Partnership L. § 121-901 (McKinney Supp. 2000), provides that "the laws of the jurisdiction under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners." The statute, enacted as uniform law by every state except Louisiana, states a general rule of the conflict of laws and reinforces a provision of the 1994 agreement providing that "matters relating to the formation and organization of the Partnership shall be governed by the [Turks and Caicos] Act."[5] (Pet. App. 15a).

The "internal affairs" rule is a standard conflicts principle used to choose a single law to regulate "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders . . . ." *Atherton*, 519 U.S. at 223-24 (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982)). By analogy to relationships among shareholders in a close corporation, *see, e.g., Rosenmiller v. Bordes*, 607 A.2d 465 (Del. Ch. 1991) (applying Delaware internal affairs rule to voting restriction in shareholders'

---

[5] The Second Circuit construed the provision narrowly to mean the *original* organization of the partnership when it more naturally refers to continuous problems of organization that would arise from transferable interests of limited partners. (Pet. App. 15a).

agreement of Delaware corporation regardless of New Jersey choice-of-law clause), the uniform statute would regard the relative rights of assignor and assignee of an entire interest in an Islands' limited partnership as an "internal affairs" matter. *Wyss v. Albee*, 469 N.W.2d 247 (Wis.Ct. App. 1991) (rights of limited partner in Iowa limited partnership to payment from other limited partners governed by Iowa, not Wisconsin, law).

Ordinance § 6(4)(c) expressly treats the subject, evidencing its importance: it provides that an assignee of a limited partnership interest acquires "*all* the rights of the assignor . . . ." (emphasis supplied). The English law of the Islands indicates that "all" rights includes arbitration rights: "the better view is that upon a legal assignment the assignor loses the right to arbitrate and the assignee acquires it . . . ." *Schiffartsgesellschaft Detlev von Appen GmbH v. Voest Alpien Intertrading GmbH*, [1997] 1 Lloyd's Rep. 179, 188 (Q.B.) (quoting *The Halcyon*, [1984] 1 Lloyd's Rep. 283, 289 (Q.B.)), *appeal dismissed*, [1997] 2 Lloyd's Rep. 279 (C.A.)).

The rule is consistent with the general law of assignments, which holds that "the transfer of a contract *extinguishes* the assignor's right to performance by the obligor and gives the assignee a right to that performance." 3 E. Allan Farnsworth, *Farnsworth on Contracts* § 11.3, at 68 (1998) (emphasis supplied); *accord Aaron Ferer & Sons, Ltd. v. The Chase Manhattan Bank*, 731 F.2d 112, 125 (2d Cir. 1984) (assignment "extinguishes" rights of assignor). The instruments of assignment did not reserve assignment rights to assignor-respondents.

The Second Circuit justified departure from the New York Partnership Law and its conflicts provision with the following misconceived analysis of the relation between the FAA and state law (Pet. App. 16a):

> In this case, the 1994 Agreement's dispute resolution provision provided that arbitration "shall for all purposes be governed by, and construed and enforced in accordance with, the Federal Arbitration Act ("FAA"), and matters of interpretation of the provisions of this Agreement shall be governed by Texas law in any such arbitration." It is thus clear that neither party intended New York law, procedural or otherwise, to govern any aspect of their dispute.

There are several errors here. First, it is not "New York law" in its internal sense but its choice-of-law rule, expressed in § 121-901 of the Partnership Law, that was binding on the forum below. The position is analogous to the duty of federal courts in *Klaxon* cases.[6]

Second, the agreement's choice of the FAA to govern arbitration proceedings cannot be taken to imply a choice of federal common law as the substantive law of the contract. To the very limited extent the FAA is substantive, the statute operates nationally in accordance with its terms, indifferent to intentions of contract parties. *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880) (federal law is part of state law automatically); *Fidelity Fed. Savings & Loan Assoc. v. De la Cuesta*, 458 U.S. 141, 151 n. 12 (1982) (contract choice of state law necessarily includes federal law). The 1994 agreement's reference to the FAA is a gratuitous procedural matter; the statute applies, or does not apply, willy-nilly.

Third, the choice of Texas law solely to "interpret" the 1994 agreement does not affect the assignment issue, which does not turn on, and is external to, the text of the agreement. Nor could so narrow a provision override the New York *statute* (a declaration of state policy uniform in the

---

[6] *See Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487 (1941) (in diversity cases, federal court must apply conflicts rule of forum).

country) applying foreign domiciliary law to the internal affairs of a foreign limited partnership. *See Clark v. Kelly*, 1999 Del. Ch. Lexis 148 (Del. Ch. June 24, 1999) (even if Delaware choice-of-law clause might apply, equity owner in California corporation is determined by California law); *Rosenmiller*, 607 A.2d 465 (Delaware internal affairs rule applied to voting restriction in agreement among shareholders of Delaware corporation; New Jersey choice-of-law clause superseded). Moreover, Texas law, in adopting the Revised Limited Partnership Act, is identical to New York law and would look to the law of the Islands for resolution of this internal affairs issue. Vernon's Ann. Tex. Civ. Stat. art. 6132a-1, § 9.01(a). Also, the Texas statute, for *domestic* limited partnerships, states that when an assignee of a limited partner becomes a partner, the assignor is divested of rights. *Id.* § 7.02(a)(4). Like New York, Texas would be equally bound to apply the conflicts rule mandated by the statute to a dispute internal to a foreign limited partnership.

Granting the writ will establish the proper relation of the FAA to state law, and settle the point that state law applies in non-diversity cases absent clear, supervening federal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH D. BECKER
Counsel of Record
BECKER, GLYNN, MELAMED
& MUFFLY LLP
299 Park Avenue
New York, New York 10171
(212) 888-3033

RICHARD N. CHASSIN
ZEB LANDSMAN
KEVIN OLSON,
Of Counsel

Counsel for Petitioner

May 18, 2000

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 1999

Argued: September 15, 1999 Decided: December 8, 1999

Docket No. 99-7101

SMITH/ENRON COGENERATION LIMITED PARTNERSHIP, INC., ENRON INTERNATIONAL C.V., ENRON DEVELOPMENT CORP., ENRON RESERVE I B.V., ATLANTIC COMMERCIAL FINANCIAL B.V., and TRAVAMARK TWO B.V.,

Petitioners-Appellees,

—against—

SMITH COGENERATION INTERNATIONAL, INC.,

Respondent-Appellant.

Before:

FEINBERG, VAN GRAAFEILAND and SACK,

Circuit Judges.

Appeal from order of United States District Court for the Southern District of New York, Richard C. Casey, J., compelling respondent-appellant Smith Cogeneration International, Inc. (SCI) to arbitrate claims asserted by SCI in a lawsuit in the Dominican Republic against petitioners-appellees. We find that the district court properly asserted jurisdiction under Chapter Two of the FAA, implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. We further find that there was an enforceable arbitration agreement, and that included within its scope are the claims asserted by SCI. The order of the district court is affirmed.

RICHARD N. CHASSIN, New York, NY (Becker, Glynn, Melamed & Muffly LLP, Joseph D. Becker, Zeb Landsman, of Counsel), *for Respondent-Appellant.*

GREGORY A. MARKEL, New York, NY (Brobeck Phleger & Harrison LLP, Ronit Setton, of Counsel), *for Petitioners-Appellees.*

FEINBERG, Circuit Judge:

Respondent Smith Cogeneration International, Inc. (SCI) appeals from an order of the United States District Court for the Southern District of New York, Richard C. Casey, J., compelling arbitration of claims asserted by SCI in a lawsuit in the Dominican Republic (the Dominican Lawsuit) against petitioners-appellees Smith/Enron Cogeneration Limited Partnership, Inc. (SECLP) and Enron International C.V. (Enron Int'l) and a number of its affiliates

(collectively referred to as Enron). SCI's principal arguments on appeal are (1) under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention) the district court did not have jurisdiction over this action; (2) the contracts between the parties containing the arbitration clause are no longer enforceable by Enron; and, (3) SCI's claims in the Dominican Lawsuit are not covered by the arbitration clause. For the reasons stated below, we affirm the order of the district court.

I. Background

This case arises out of a number of agreements between SCI and Enron regarding an electrical power plant in the Dominican Republic. In July 1993, SCI signed a Power Purchase Agreement with a state-owned utility, Compañia Dominicana de Electricidad (CDE), to construct, finance and manage the power plant (Power Purchase Agreement). While negotiating this agreement, SCI encountered strong competition from Enron, which was making its own offers to the Dominican government. After some negotiation, SCI and Enron Int'l agreed to create a joint venture in the construction and operation of the plant as reflected in the Project Agreement they both signed on November 12, 1993 (Project Agreement).

On November 24, 1993, Smith Cogeneration Dominicana (SCD), SCI's affiliate,[1] entered into a limited partnership agreement with Travamark Two B.V. (Travamark), an Enron affiliate (1993 Agreement). The 1993 Agreement created SECLP, a limited partnership organized under the laws of the Turks and Caicos Islands. Pursuant to the 1993 Agreement SCI was to assign its interest in the Power Purchase Agreement to SECLP, which would then take over the construction and operation of the power plant.

---

[1] The principal of both SCD and SCI is the same person, Donald Smith.

Thereafter, a series of assignments by both signatories to the 1993 Agreement (SCD and Travamark) took place. SCD assigned part of its interest in SECLP to SCI. Similarly, Travamark assigned its interest in SECLP to two Enron affiliates, Atlantic Commercial Finance B.V. (ACF) and Enron Reserve I B.V. (ER). The 1993 Agreement was amended in December 1994 to reflect these changes (1994 Agreement).

The 1994 Agreement, like the 1993 Agreement and the Project Agreement that preceded it, contained a broad arbitration clause providing for the arbitration of "any dispute . . . arising under or relating to any obligation or claimed obligation under the provisions of this Agreement." All three agreements also provided that the arbitration take place in New York and be governed by the Federal Arbitration Act (FAA), 9 U.S.C. §1 et seq., and Texas law. The 1993 and the 1994 Agreements were identical in all other relevant respects.

Less than a year after SCI, SCD, ACF, and ER entered into the 1994 Agreement, a second series of assignments took place. In July 1995, ER assigned its general partnership interest to Enron Dominican Republic Operations (EDRO), and ACF assigned its limited partnership interest to Enron Dominican Republic (EDR). Neither party disputes that these assignments were permitted under the 1994 Agreement and were made with SCI's knowledge and consent. Enron additionally claims that, as with the previous assignments, these assignees are Enron affiliates with identical economic interests and under common control. In contrast to all the previously named Enron affiliates (Enron Int'l, Travamark, ACF, and ER), EDR and EDRO—the current Enron partners in SECLP—were not sued by SCI in the Dominican Lawsuit and are not petitioners in this litigation.

The Enron-SCI relationship began to unravel in 1996 when it became clear that SCI was unable to meet its finan-

cial obligations to SECLP. As a result, in April 1996 the 1994 Agreement was amended to include the Smith Dominicana Holding Limited Partnership (Holding Partnership). The Holding Partnership, a creation of SCD and another Enron affiliate, Finven, was a mechanism for infusing money into SECLP: SCD would in effect sell 35% of its interest in SECLP to Finven, and either repurchase it by November 1997 or receive $50,000 in consideration from Finven. SCD proved unable to repurchase its interest, and a dispute arose between it and Finven. As a result, the two entities proceeded to arbitration in June 1998.[2] That arbitration took place under the contract creating the Holding Partnership and its result is not the subject of this appeal.

Shortly after the debacle for SCI in the arbitration with Finven and with SCI's position in SECLP apparently eroding, SCI filed the Dominican Lawsuit in July 1998. In that suit, SCI named all of the petitioners in the instant case as defendants, referring to them throughout the complaint as "Enron," the "Enron Group," "the Enron companies," and describing them as affiliates. In its complaint in that action, SCI alleged that it was coerced into the SECLP partnership by Enron, that all of SCI's Agreements with Enron were fraudulently induced, and that Enron tortiously interfered with SCI's negotiations with CDE. SCI demanded rescission of the Project Agreement, the 1993 Agreement and the 1994 Agreement and approximately $159 million in damages.

Whereupon we arrive at the instant action. In August 1998, SECLP and Enron filed a petition in the Southern District to compel arbitration of the dispute with SCI and to enjoin SCI from prosecuting the Dominican Lawsuit. In

---

[2] According to the record before us, that arbitration took place in New York before the Honorable Abraham Sofaer. During the arbitration, SCD conceded Finven's rights under the Holding Partnership. Judge Sofaer awarded Finven $300,000 in attorney's fees which has not yet been paid by SCD.

the district court, Enron argued that under the broad arbitration clause in the 1993 and 1994 Agreements, SCI is bound to arbitrate its dispute with Enron. After oral argument in November 1998, Judge Casey ruled from the bench, granting Enron's motion to compel arbitration and enjoining SCI from prosecuting the Dominican Lawsuit. This appeal followed.

II. Discussion

On appeal, SCI argues that there is no federal subject matter jurisdiction over this action because the 1994 Agreement is not "centered" in a state that is a signatory to the Convention. Next, SCI claims that because none of the petitioners are currently signatories to the 1994 Agreement as a result of the various transactions outlined above, they no longer have the right to compel arbitration of disputes under that Agreement. Finally, SCI argues that its claims in the Dominican Lawsuit are based upon Enron's actions that predate the 1994 Agreement and thus are beyond the scope of the arbitration clause. We treat these claims in separate sections below.

A. Jurisdiction under the Convention

SCI argues that the district court did not have subject matter jurisdiction over this dispute. SCI and Enron agree that the only basis for federal jurisdiction, if it exists, is Chapter Two of the FAA, 9 U.S.C. §§ 201-208.[3] Section 201 provides for the enforcement of the Convention.[4] Sec-

[3] SCI claims that diversity is lacking and Enron does not contest that point.

[4] Section 201 provides: "The Convention on the Recognition and Enforce-ment of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter." The full text of the Convention may be found immediately following 9 U.S.C. § 201.

tion 203 provides that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States." In considering whether the Convention applies to this arbitration, we are mindful that "[t]he goal of the Convention is to promote the enforcement of arbitral agreements in contracts involving international commerce so as to facilitate international business transactions," David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245, 250 (2d Cir.), cert. dismissed, 501 U.S. 1267 (1991), and to "unify the standards by which agreements to arbitrate are observed." Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974). The adoption of the Convention by the United States promotes the strong federal policy favoring arbitration of disputes, particularly in the international context. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 638-40 (1985).

A district court may compel arbitration under Chapter Two of the FAA pursuant to 9 U.S.C. § 206, which provides:

> A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States.

Section 202 defines the type of arbitration agreements that fall under Chapter Two of the FAA:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envis-

> ages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

The Convention and the implementing provisions of the FAA set forth four basic requirements for enforcement of arbitration agreements under the Convention: (1) there must be a written agreement; (2) it must provide for arbitration in the territory of a signatory of the convention; (3) the subject matter must be commercial; and (4) it cannot be entirely domestic in scope. Ledee v. Ceramiche Ragno, 684 F.2d 184, 186-87 (1st Cir. 1982); see also Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1018 (2d Cir. 1993). We agree with (then Chief) Judge Coffin in *Ledee* that a district court's scope of inquiry in considering a petition to compel arbitration under Chapter Two of the FAA is "very limited." 684 F.2d at 186. Although the various agreements between SCI and Enron apparently satisfy these four requirements, SCI nonetheless claims that the district court lacked jurisdiction.

SCI invites us to employ a "center of gravity" test to determine whether the instant arbitration falls under the Convention. SCI's "center of gravity" test, which it does not clearly define, apparently would require the subject matter of the arbitration, or the parties to the arbitration, or both, to be located in a State that also is a signatory to the Convention. SCI and SECLP are incorporated in the British Virgin Islands and the Turks and Caicos Islands respectively, and the location of the power plant is in the Dominican Republic, none of which is a signatory to the Convention.[5] Accordingly, SCI argues, this dispute lies beyond the scope of the Convention. Enron responds that (1) the only State that must be a signatory to the Convention is the State

[5] The United Kingdom, a signatory to the Convention, did not extend it to its dependencies, the Turks and Caicos Islands and the British Virgin Islands. See Note 28 to the Convention.

where the arbitration is to take place, the second requirement mentioned in *Ledee*; and (2) as the Agreements between the parties provided for arbitration in the United States (specifically in New York City), which is a signatory to the Convention, there is federal jurisdiction. For the reasons stated below, we agree with Enron and decline to adopt SCI's "center of gravity" test.

The starting point in construing a treaty is its text. Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 534 (1991). The relevant portion of the Convention is Article II, which governs an action to enforce an arbitration agreement. Article II provides:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect to which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Thus, in Article II the "Contracting State" concept appears only to designate the location of the court where "recognition" of an agreement in writing to arbitrate is sought. The purpose behind this drafting choice is clear: the courts

of a signatory to the Convention should abide by its goal of enforcing international agreements to arbitrate disputes. Similarly, the FAA in 9 U.S.C. § 202 makes no mention of a requirement that the arbitration involve parties subject to the jurisdiction of Contracting States or that the location of the dispute be "centered" in such a State. While 9 U.S.C. § 202 explicitly excludes domestic disputes from Chapter Two of the FAA, it does not make any distinctions among foreign disputes or foreign parties.

SCI's effort to import a "center of gravity" test into application of the Convention is further weakened by the Convention's history. The Convention was drafted to eliminate many of the problems that hindered enforcement of its predecessor, the Geneva Convention of 1927. See Leonard V. Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049, 1055-61 (1961). Most importantly, the Convention eliminated the requirement in the Geneva Convention that the parties be subject to the jurisdiction of Contracting States. See Cindy Silverstein, Comment, Iran Aircraft Industries v. Avco Corporation: Was a Violation of Due Process Due?, 20 Brook. J. Int'l L. 443, 453-54 (1994); see also Albert Jan van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation 8-9 (1994). Under Article II of the Convention, the citizenship of the parties to the agreement and the location of the disputed subject matter are not controlling.

In La Societe Nationale Pour La Recherche v. Shaheen Natural Resources Co., 733 F.2d 260 (2d Cir. 1984) (per curiam), this court affirmed a judgment of the Southern District "for the reasons set forth" in the opinion of the district judge, reported at 585 F. Supp. 57. In that case, Judge Duffy had confirmed an arbitral award in favor of plaintiff, a company owned by the Algerian government, a non-signatory to the Convention. The contract between the parties

involved the sale of crude oil by the plaintiff to the defendant, an Illinois company with its principal place of business in New York. The contract provided for arbitration in Geneva, Switzerland (a signatory State) under Algerian law. The defendant in that case argued that the plaintiff could not invoke the Convention against it "because as an arm of the Algerian government," plaintiff was not a party to the Convention. Id. at 64. Although the context for the decision was Article I of the Convention, which deals with arbitral *awards* rather than with arbitration *agreements*, the court's reasoning applies with equal force to the rest of the Convention: "The focus of . . . the Convention is not on the nationality of the party seeking to enforce an award but on the *situs of the arbitration*. Indeed, arbitration awards rendered by panels sitting in contracting countries have been confirmed consistently when the plaintiff is a national of a country which has not acceded to the Convention." Id. (emphasis added); see also Imperial Ethiopian Gov't v. Baruch-Foster Corp., 535 F.2d 334, 335 (5th Cir. 1976) (confirming an arbitral award in favor of the Ethiopian government, a non-signatory); In re Arbitration Between: Trans Chemical Ltd. and China Nat'l Mach. Import & Export Corp., 978 F. Supp. 266 (S.D. Tex. 1997), aff'd, 161 F.3d 314 (5th Cir. 1998) (confirming arbitral award in favor of Pakistani corporation and against Chinese corporation regarding construction of a plant in Pakistan, a non-signatory); National Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800 (D. Del. 1990) (enforcing an arbitration award in favor of a company in Libya, a nonsignatory). We have previously applied the Convention to an arbitration between two foreign companies without commenting at all about the contracting status of any of the states involved. See, e.g., Bergesen v. Joseph Muller Corp., 710 F.2d 928 (2d Cir. 1983) (confirming award between two foreign companies); see also Jain v. Mere, 51 F.3d 686 (7th Cir. 1995) (compelling arbitration between French and Indian citizens).

The Convention's sweeping approach toward arbitral agreements in Article II and arbitral awards in Article I led many of the signatory states, including the United States, to adopt certain reservations to its implementation. One such reservation, the exclusion from the Convention of arbitral agreements and awards that are entirely domestic in scope, see Ledee, 684 F.2d at 187, has already been mentioned. The United States also adopted the reservation provision in Article I(3) of the Convention, governing arbitral *awards*, which provides that "any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State." See Note 29 to the Convention. SCI relies on this "reciprocity" provision to bolster its argument that the United States cannot enforce SCI's Agreements with Enron unless there is another "Contracting State" involved in the dispute.

SCI's reliance on the "reciprocity" provision is misplaced. First, it is questionable whether that provision, which is found only in Article I of the Convention, even applies to Article II. But even if it did, the reciprocity provision does not contemplate the "center of gravity" test suggested by SCI. All that the reciprocity provision requires is that the award be granted in a "Contracting State." In this case, the arbitration agreements between SCI and Enron contemplated arbitration in the United States—a signatory to the Convention. If the arbitration results in an award, it will have been granted in a signatory State and will be enforceable either here or in another Contracting State. Bergesen, 710 F.2d at 933-34 (awards rendered in the United States under the Convention may be enforced in the United States as long as there is substantial foreign nexus to the arbitration).

To support its "center of gravity" test, SCI also relies on the refusal of the Fifth Circuit to compel arbitration in Mississippi in National Iranian Oil Co. v. Ashland Oil, Inc.,

817 F.2d 326 (5th Cir. 1987). However, the contract in *National Iranian* provided for arbitration in Iran, a non-signatory to the Convention. This is a far cry from holding that an Iranian company could not be compelled to arbitrate a claim in the United States, if it has contracted to do so. Indeed, in dicta, *National Iranian* suggested it could be so compelled. 817 F.2d at 334.

Thus, since the 1993 and the 1994 Agreements satisfied all the requirements set forth in *Ledee*—particularly as they call for arbitration in New York—we conclude that the district court had jurisdiction under the Convention and the implementing provisions of the FAA.

B. Do the Enron Petitioners Have the Right to Compel SCI to Arbitrate?

SCI's second principal argument on appeal is that there is no valid and enforceable agreement to arbitrate between the parties to this proceeding. SCI argues that (1) the only valid agreement respecting SECLP currently in effect is the 1994 Agreement, because it superseded the earlier Agreements;[6] (2) the only Enron signatories to the 1994 Agreement, ACF and ER, have assigned their rights under that Agreement to EDR and EDRO (who are not petitioners here); (3) therefore, none of the Enron petitioners have the right to enforce a contract to arbitrate to which they are not now parties.

In considering whether "a particular dispute is arbitrable," a court must first decide "whether the parties agreed to arbitrate." Chelsea Square Textiles, Inc. v. Bombay Dye-

---

[6] In McAllister, 621 F.2d at 523, we held that a claim of "abandonment" of a contract that had concededly been made between the parties should be decided by the arbitrator. It is thus arguable that SCI's claim that the 1994 Agreement superseded the previous Agreements is for the arbitrator to decide. However, the Enron petitioners do not press that contention, and we need not reach it as we find that Enron may compel arbitration under the 1994 Agreement.

ing & Mfg. Co., 189 F.3d 289, 294 (2d Cir. 1999); see also Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060, 1063 (2d Cir. 1993). We have held that whether an entity is a party to the arbitration agreement also is included within the broader issue of whether the parties agreed to arbitrate. Interocean Shipping Co. v. National Shipping & Trading Corp., 462 F.2d 673, 677 (2d Cir. 1972); McAllister Bros., Inc. v. A&S Transp. Co., 621 F.2d 519, 524 (2d Cir. 1980).

Unquestionably, there were a number of enforceable contracts between SCI (and its affiliate, SCD) and various Enron entities, each of which contained an agreement to arbitrate. The assignments of rights under the 1994 Agreement from one set of affiliates to another set of affiliates do not negate the prior existence of a contract to arbitrate between the parties, and thus do not fall comfortably within the inquiry into the making of an agreement. The question before us is not whether SCI and the Enron petitioners entered into an agreement to arbitrate—they did (and more than once)—but whether subsequent events deprived all of the Enron petitioners of the right to compel SCI to live up to that agreement.

1. Choice of Law

Before we turn to that question, we must first resolve a threshold issue concerning applicable law. SCI argues that state contract law principles generally apply in an inquiry into the making of the agreement. See Doctor's Assocs. Inc. v. Casarotto, 517 U.S. 681, 686-87, 116 S.Ct. 1652, 1656 (1996); Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987). SCI suggests that we must use New York's choice of law to determine the applicable body of contract law, and that New York's choice of law points to the Turks and Caicos Islands. Alternatively, SCI argues that the 1994 Agreement itself provides that "matters relating to the formation and organization of the Partnership shall be gov-

erned by the [Turks and Caicos] Act." However, neither approach has merit on this record. First, as this is a federal question case under 9 U.S.C. § 203 and not a diversity case, we see no persuasive reason to apply the law of New York simply because it is the forum of this litigation. See Corporacion Venezolana de Fomento v. Vintero Sales Corp. et al., 629 F.2d 786, 795 (2d Cir. 1980); Filanto, S.p.A v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1235-37 (S.D.N.Y. 1992) (applying federal law to the question of whether a contract is enforceable in a case arising under the Convention); cf. Pescatore v. Pan Am. World Airways, 97 F.3d 1, 12 (2d Cir. 1996) (noting that the law is unsettled when it comes to applying federal common law or state common law in non-diversity cases). Second, the contractual provision on which SCI relies relates to "the formation and organization of the Partnership." But the partnership here—SECLP—was formed and organized well before the assignments, so that language does not apply. Rather, the primary question before us relates to the effect of the assignments on rights and duties flowing from the arbitration clause in the 1994 Agreement.

When we exercise jurisdiction under Chapter Two of the FAA, we have compelling reasons to apply federal law, which is already well-developed, to the question of whether an agreement to arbitrate is enforceable. See David L. Threlkeld & Co., 923 F.2d at 249-50 (holding Convention and FAA preempt Vermont statute); Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 845-46 (2d Cir. 1987) (applying federal common law in case arising under the Convention); Borsack v. Chalk & Vermilion Fine Arts, Ltd., 974 F. Supp. 293, 299 n.5 (S.D.N.Y. 1997) ("[W]here jurisdiction is alleged under chapter 2 of the Federal Arbitration Act the issue of enforceability and validity of the arbitration clause is governed by federal law.") Under the circumstances here, where there is little connection to the forum and the Agreements between the parties state an

intention to be governed by the FAA, proceeding otherwise would introduce a degree of parochialism and uncertainty into international arbitration that would subvert the goal of simplifying and unifying international arbitration law.

In this case, the 1994 Agreement's dispute resolution provision provided that arbitration "shall for all purposes be governed by, and construed and enforced in accordance with, the Federal Arbitration Act ("FAA"), and matters of interpretation of the provisions of this Agreement shall be governed by Texas law in any such arbitration." It is thus clear that neither party intended New York law, procedural or otherwise, to govern any aspect of their dispute. As no party is domiciled in New York, and no transactions have taken place here, New York has no connection to this litigation other than it is the location of the arbitration. While the language quoted immediately above might justify looking to Texas law on assignments, neither party argued that it applied. Thus, we will apply the body of federal law under the FAA.[7]

2. Enron's Right to Compel Arbitration.

Having determined that federal law applies, we turn now to the effect of the assignments on the right of the Enron petitioners to compel arbitration under the 1994 Agreement. Even if we accept arguendo SCI's claim that the Enron petitioners are not signatories to the 1994 Agreement, that does not end the matter.[8] In this circuit, we have repeatedly

---

[7] We doubt our result would be any different were we to look at Texas law. The Texas Supreme Court has several times announced its pro-arbitration policy and the primacy of the FAA where an arbitration agreement provides that it is governed by both Texas law and the FAA. See, e.g., EZ Pawn Corp. v. Mancias, 934 S.W.2d 87, 90-91 (Tex. 1996) (applying the FAA to question of waiver of arbitration).

[8] Of course, two of the Enron petitioners (ACF and ER) *did* sign the 1994 Agreement, but later assigned their interests to two other Enron affiliates, EDR and EDRO.

found that non-signatories to an arbitration agreement may nevertheless be bound according to "ordinary principles of contract and agency." McAllister Bros., 621 F.2d at 524; Delloitte Noraudit A/S, 9 F.3d at 1064. These principles include "(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel." Thomson-CSF, S.A. v. American Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995). We believe that a number of these concepts justify allowing the Enron petitioners to compel SCI to arbitrate its claims asserted against them in the Dominican Lawsuit.

In applying these concepts, we note, as we did in *Thomson-CSF* with respect to "veil-piercing," that such determinations are often "fact specific" and differ with "the circumstances of each case." 64 F.3d at 777-78 (citation omitted). More importantly, while a court should be wary of imposing a contractual obligation to arbitrate on a non-contracting party, we do not face that concern here. SCI is the party trying to escape its obligation to arbitrate, but it (and/or its affiliate SCD) was a signatory to all three arbitration Agreements with Enron—that is, the Project Agreement, the 1993 Agreement and, most importantly, the 1994 Agreement.[9] Normally, it is the signatory to an arbitration agreement that urges us to apply a veil-piercing doctrine, see, e.g., Thomson-CSF, 64 F.3d at 777-78, to require the non-signatory to arbitrate because of the special circumstances that apply. In this case, however, it is the Enron petitioners (the alleged "non-signatories" to the contract) that invite us to pierce their own corporate veil because of claimed special circumstances.

Enron argues that the corporate relationship among the various Enron affiliates justifies allowing the Enron petitioners to invoke the arbitration clause in the 1994 Agree-

[9] SCD was the only "Smith Cogeneration" signatory on the 1993 Agreement. SCI was a signatory on the Project Agreement and the 1994 Agreement.

ment. The identity of interests between petitioners and the current Enron signatories to the 1994 Agreement (EDR and EDRO) is nowhere more apparent than on the assignment instruments themselves: the signatures of the assignors in the assignments from ACF and ER to EDR and EDRO are the same as the signatures for the assignees. Similarly, virtually all the correspondence between SCI and the various Enron petitioners is mailed to the same address in Texas, "c/o Enron Development Corp." Perhaps most telling is SCI's own reference to the various Enron companies in its complaint in the Dominican Lawsuit as the "Enron Group," "affiliates," and "Enron." In the Dominican Lawsuit, SCI treated a group of related companies as though they were interchangeable, but now it asks for strict adherence to the corporate form in its opposition to arbitration. On this record, that is not called for. We believe that all the circumstances here justify piercing the corporate veil.

In addition, Enron's claim that SCI should be estopped from resisting arbitration is equally, if not more, compelling. In *Thomson-CSF* we set forth two types of estoppel cases. 64 F.3d at 778-79. The more typical case, as we have already noted, arises when a signatory to an arbitration agreement seeks to bind a non-signatory to it. We have held that the non-signatory may be compelled to arbitrate when it has derived other benefits under the agreement containing the arbitration clause. See American Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999); Deloitte Noraudit A/S, 9 F.3d at 1064. But even when a non-signatory seeks to compel arbitration with a signatory, we pointed out that the Fourth and Eleventh Circuits "have been willing to estop a *signatory* from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed." Thomson-CSF, 64 F.3d at 779 (referring to Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d

753, 757-58 (11th Cir. 1993); J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-21 (4th Cir. 1988)). We find that this case falls within the latter category.

In the Dominican Lawsuit, SCI asked for the "nullification or rescission of all of the agreements entered into between [SCI] and its related companies and persons related to [Enron] and any other entity or person of the Enron Group," and sued all the Enron signatories to the Project Agreement, 1993 Agreement and the 1994 Agreement except for EDR and EDRO, the most recent signatories to the 1994 Agreement. It is clear that the Enron defendants in the Dominican Lawsuit are the ones entitled to relief, as the subject matter of that lawsuit arises under all of those Agreements, particularly the 1994 Agreement. Further, as already stated, by treating the Enron entities as a single unit in its complaint in the Dominican Lawsuit, SCI is estopped from claiming that the current signatories to the 1994 Agreement are distinct from the defendants in the Dominican Lawsuit. Therefore, we conclude that SCI cannot now shield itself from arbitration by arguing that only the 1994 Agreement contains an enforceable arbitration clause, and that only EDR and EDRO—the parties [SCI intentionally did not sue in the Dominican Lawsuit—would have the right to invoke it. Cf. IDS Life Ins. Co. v. Sunamerica, Inc., 103 F.3d 524, 530 (7th Cir. 1996) (Posner, C.J.) (where a party to an arbitration agreement attempts to avoid that agreement by suing a "related party with which it has no arbitration agreement, in the hope that the claim against the other party will be adjudicated first and have preclusive effect in the arbitration. Such a maneuver should not be allowed to succeed . . . .").

For these reasons, we affirm the district court's ruling that the Enron petitioners have the right to compel SCI to arbitrate.

C. Are SCI's Claims in the Dominican Lawsuit within the Scope of the 1994 Arbitration Agreement?

Finally, SCI argues that the claims it asserted against Enron in the Dominican Lawsuit are not arbitrable because they are not covered by the arbitration provision in the 1994 Agreement. These claims are that SCI was coerced into the SECLP partnership by Enron, that all of SCI's Agreements with Enron were fraudulently induced, and that Enron tortiously interfered with SCI's negotiations with CDE.

The 1994 Agreement provides in relevant part:

> 11.14 *Dispute Resolution* (a) In the event of any dispute, disagreement, controversy or claim arising under or relating to any obligation or claimed obligation under the provisions of this Agreement (a "*Dispute*" which term shall include any tort claim relating to or in connection with this Agreement . . .), the party seeing resolution of such Dispute shall give notice to the other party . . . .
>
> . . . .
>
> (c) Any Dispute that is not resolved by the parties shall be finally settled by arbitration.

Despite this broad language and the explicit reference to "any tort claim," SCI contends that its claims in the Dominican Lawsuit fall outside the scope of this language. SCI argues that because Enron's alleged improper actions took place in 1993, prior to the signing of the 1994 Agreement, the arbitration provision does not cover them.

We have stated previously that in light of "the strong federal policy in favor of arbitration, the existence of a broad agreement to arbitrate creates a presumption of arbitrability which is only overcome if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts

should be resolved in favor of coverage." Worldcrisa Corp. v. Armstrong, 129 F.3d 71, 74 (2d Cir. 1997) (citations and internal quotation marks omitted). We stated in *Genesco* that when we consider "whether a particular claim falls within the scope of the parties' arbitration agreement, we focus on the factual allegations in the complaint rather than the legal causes of action asserted. If the allegations underlying the claims 'touch matters' covered by the parties' . . . agreements, then those claims must be arbitrated, whatever the legal labels attached to them." 815 F.2d at 846 (citation omitted).

SCI's argument that its claims against Enron concern events that predate the 1994 Agreement does not persuade us that the district court erred here in ordering arbitration. In Coenen v. R.W. Pressprich & Co., 453 F.2d 1209, 1212 (2d Cir. 1972), we held that arbitration under the New York Stock Exchange Rules applied to actions predating the signing of the contract by the petitioner because the contract stated that it governed "any controversy" between the parties. As the arbitration clause here similarly does not contain any temporal limitation, the relevant inquiry is whether SCI's claims "relat[e] to any obligation or claimed obligation under" the 1994 Agreement, not when they arose. We think it is evident that SCI's claims in the Dominican Lawsuit fall within this broad language. Further, as fraudulent inducement claims necessarily involve actions that predate the signing of a contract, taking SCI's argument to its logical extreme would mean that such claims are generally non-arbitrable. Yet, the Supreme Court in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967), held that claims of fraudulent inducement of a contract generally, as opposed to fraudulent inducement of the arbitration clause specifically, are arbitrable. SCI's claims in the Dominican Lawsuit relate to the inducement of the 1994 Agreement as a whole. Thus, resolving any doubt with respect to the scope of the arbi-

tration clause in favor of arbitration, we find that SCI's claims in the Dominican Lawsuit are arbitrable.

III. Conclusion

We affirm the decision of the district court to compel arbitration and enjoin SCI from prosecuting the action in the Dominican Republic. We conclude that there is federal jurisdiction under the Convention and the FAA. The assignments under the 1994 Agreement do not prevent Enron from invoking the arbitration clause in that Agreement; in any event, we find that SCI is estopped from raising this claim. Finally, SCI's claims in the Dominican Lawsuit fall within the scope of the arbitration clause in the 1994 Agreement. We have considered all of SCI's claims and find them without merit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No: 99-7101
Filed February 23, 2000

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the ___ day of February two thousand.

SMITH/ENRON,

Petitioners-Appellees,

—v.—

SMITH COGENERATION,

Respondent-Appellant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Smith-Cogeneration.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
by:

BETH J. MEADOR
Beth J. Meador
Administrative Attorney

Supreme Court, U.S.
FILED
JUL 18 2000
CLERK

(2)

No. 99-1857

IN THE

Supreme Court of the United States

SMITH COGENERATION INTERNATIONAL, INC.,

Petitioner,

v.

SMITH/ENRON COGENERATION LIMITED PARTNERSHIP, INC., ENRON INTERNATIONAL C.V., ENRON DEVELOPMENT CORP., ENRON RESERVE I B.V., ATLANTIC COMMERCIAL FINANCIAL B.V. and TRAVAMARK TWO B.V.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

GREGORY MARKEL
Counsel of Record
RONIT SETTON
BROBECK, PHLEGER & HARRISON LLP
Attorneys for Respondents
1633 Broadway, 47th Floor
New York, New York 10019
(212) 581-1600

160955

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

27 pp

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Rule 29.6, Respondents Smith/Enron Cogeneration Limited Partnership, Inc., Enron International C.V., Enron Development Corp., Enron Reserve I B.V., Travamark Two B.V. and Atlantic Commercial Financial B.V. make the following disclosures:

There are no publicly held companies that own 10% or more of the stock of any Respondents. The parent companies or owners of Respondents are as follows:

SMITH/ENRON COGENERATION LIMITED PARTNERSHIP, INC.

General Partners:

Smith Cogeneration Dominicana, Inc.
Enron Dominican Republic Operations Ltd.

Limited Partners:

Smith Cogeneration International, Inc.
Enron Dominican Republic Ltd.
Enron Dominicana Limited Partnership

ENRON INTERNATIONAL C.V.

General Partner:

Enron International B.V.

Limited Partner:

India Electric Maintenance Ltd.

ENRON DEVELOPMENT CORP.

Owner(s):

Enron Power Corp.

ENRON RESERVE I B.V.

Owner(s):

Atlantic Commercial Finance, Inc.

TRAVAMARK TWO B.V.

Owner(s):

Atlantic Commercial Finance, Inc.

ATLANTIC COMMERCIAL FINANCIAL B.V.
(The correct name of this party is Atlantic Commercial Finance B.V. I.i.)

Owner(s):

Atlantic Commercial Finance, Inc.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	iii
Table of Cited Authorities	iv
Reasons for Denying the Writ	1
Statement of Facts	3
I. Federal Law Governs The Enforcement Of Arbitration Between The Parties	6
A. Federal Law Dictates That Agreements to Arbitrate be Enforced According to Their Terms	6
B. Federal Law Applies Because this Dispute Implicates the Convention	8
C. There is no Basis for Applying New York Law in this Case	10
D. The Second Circuit's Ruling Does Not Conflict with Supreme Court Precedent or Decisions in Other Circuits	11
II. The Arbitration Agreements Are Enforceable Under Federal Law	13
Conclusion	20

TABLE OF CITED AUTHORITIES

Page

Cases:

Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank National Ass'n, 731 F.2d 112 (2d Cir. 1984) ... 10, 12

Acquaire v. Canada Dry Bottling, 906 F. Supp. 819 (E.D.N.Y. 1995) 18

American Diagnostica of Connecticut, Inc. v. Centerchem, Inc., No. 94 Civ. 7047 (DC), 1996 WL 71494 (S.D.N.Y. Feb. 20, 1996) 18

Atherton v. FDIC, 519 U.S. 213 (1997) 12

AT&T Techs., Inc. v. Communications Workers of America, 475 U.S. 643 (1986) 19

Butchers, Food Handlers & Allied Workers Union v. Hebrew Nat'l Kosher Foods, Inc., 818 F.2d 283 (2d Cir. 1987) 19

Coenen v. R.W. Pressprich & Co., 453 F.2d 1209 (2d Cir. 1972), *cert. denied*, 406 U.S. 949 (1972) 8, 19

David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245 (2d Cir. 1991) 8

Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060 (2d Cir. 1993) 14

Cited Authorities

	Page
Dobson v. Counsellors Secs., Inc., No. 94-CV-73942-DT, 1995 WL 871004 (E.D. Mich. Sept. 13, 1995)	20
Doctor's Assocs. Inc. v. Casarotto, 517 U.S. 681 (1996)	12
E.G.L. Gem Lab Ltd. v. Gem Quality Inst. Inc., No. 97 Civ. 7102 (LAK), 1998 WL 314767 (S.D.N.Y. June 15, 1998)	15
EZ Pawn Corp. v. Mancias, 934 S.W.2d 87 (Tex. 1996)	7
Filanto, S.p.A v. Chilewich Int'l Corp., 789 F. Supp. 1229 (S.D.N.Y. 1992)	9
First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995)	12
Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840 (2d Cir. 1987)	8
Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126 (7th Cir. 1997)	12
Harvey v. Joyce, 199 F.3d 790 (5th Cir. 2000)	8
Insta-Bulk, Inc. v. Powertex Inc., 764 F. Supp. 52 (S.D.N.Y. 1991)	18

Cited Authorities

Page

Jack B. Anglin Co., Inc. v. Tipps, 842 S.W.2d 266 (Tex. 1992) 7

J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315 (4th Cir. 1988) 14, 15

Lachmar v. Trunkline LNG Co., 753 F.2d 8 (2d Cir. 1985) 17

Letizia v. Prudential Bache Secs., Inc., 802 F.2d 1185 (9th Cir. 1986) 8

Litton Fin. Printing Div. v. NLRB, 501 U.S. 190 (1991) 18

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 6

McAllister Bros., Inc. v. A & S Transp. Co., 621 F.2d 519 (2d Cir. 1980) 14

McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co., 741 F.2d 342 (11th Cir. 1984) 14

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614 (1985) 8

Monroe Sander Corp. v. Livingston, 377 F.2d 6 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967) 18

Cited Authorities

	Page
Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)	7
Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO, 430 U.S. 243 (1977)	19
Oldroyd v. Elmira Savs. Bank, FSB, 134 F.3d 72 (2d Cir. 1998)	7
Perry v. Thomas, 482 U.S. 483 (1987)	12
Riley Mfg. Co., Inc. v. Anchor Glass Container Corp., 157 F.3d 775 (10th Cir. 1998)	12
Sharon Steel Corp. v. Jewell Coal and Coke Co., 735 F.2d 775 (3d Cir. 1984)	8
Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753 (11th Cir. 1993), *cert. denied*, 513 U.S. 869 (1994)	14, 15
Tenneco Resins, Inc. v. Davy Int'l, A.G., 770 F.2d 416 (5th Cir. 1985)	17
Thomson-CSF, S.A. v. American Arbitration Ass'n., 64 F.3d 773 (2d Cir. 1995)	14
United States v. Panhandle Eastern Corp., 693 F. Supp. 88 (D. Del 1988)	17

Cited Authorities

Page

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 19, 20

Vainqueur Corp. v. Lamborn & Co., 305 F. Supp. 1007 (S.D.N.Y. 1969) 16

Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1989) 6

Statutes:

9 U.S.C. §§ 201-208 1

9 U.S.C. § 203 9

Other Authority:

Joseph T. McLaughlin, *Alternative Dispute Resolution in the Corporate Sector*, SDO6 ALI-ABA 1231 (1998) 6

REASONS FOR DENYING THE WRIT

The sole issue presented by the Petition is whether the Second Circuit properly held that federal law, rather than New York law, governs the enforceability of agreements to arbitrate between Petitioner Smith Cogeneration International, Inc. ("SCI") and Respondents Enron International C.V. and a number of its affiliates (collectively, "Enron" or the "Enron Entities"). Applying federal law, the Second Circuit affirmed the district court's order compelling arbitration and enjoining SCI from pursuing its lawsuit in the Dominican Republic against Enron in contravention of SCI's agreements to arbitrate disputes with Enron.

Under the facts of this case, there can be no question that federal law applies: (i) the arbitration agreements between the parties expressly provide that the Federal Arbitration Act ("FAA") applies to the enforcement of arbitration; (ii) this is a federal question case arising under Chapter Two of the FAA, 9 U.S.C. §§ 201-208 (implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention")); (iii) there are compelling reasons to apply federal law, which is already well-developed, to the question of whether an agreement to arbitrate is enforceable; (iv) there exists a strong federal policy in favor of arbitration, particularly in the international context; and (v) the parties did not intend that New York law would govern any disputes.

In an attempt to avoid arbitration despite having entered into several broad agreements to arbitrate disputes with Enron, SCI makes the convoluted assertion that New York's choice of law rules apply and in turn point to the law of Turks and Caicos (and thereby some dicta from a British case and an ordinance that does not even address the relevant issue). There is simply no basis, however, for the first step

in SCI's analysis — that New York law applies. None of the agreements at issue contains any reference to New York law, much less a New York choice of law provision, none of the parties is a New York resident, none of the underlying events occurred in New York, and the parties do not assert diversity jurisdiction. Contrary to SCI's assertion that the Second Circuit's ruling (the "Opinion") conflicts with Supreme Court and Circuit Court decisions, none of the cases cited in the Petition arose under the Convention or involved an arbitration agreement specifying the applicability of the FAA.[1]

---

1. SCI also claims in passing that the Second Circuit "misus[ed] veil piercing and estoppel theories" in holding that Enron is entitled to invoke the arbitration clause despite the assignments made by the parties. SCI briefly explains its objection to the Court's use of the veil-piercing theory in a footnote, but never explains why the Second Circuit allegedly "misus[ed]" an estoppel theory to prevent SCI from avoiding its obligation to arbitrate disputes with Enron. *See* Pet. at 5 & n.4. Enron believes that SCI's cursory reference to the Second Circuit's determination on these issues, which is not mentioned in any other section of the Petition, is insufficient for purposes of seeking and obtaining a writ of certiorari. In the event that this Honorable Court determines that these issues are properly raised by the Petition, however, we respectfully refer the Court to Part II of this Opposition and to Enron's Answer to SCI's Petition for Rehearing before the Second Circuit, in which Enron demonstrates that these aspects of the Second Circuit's ruling are also correct. We also note that the Second Circuit held that SCI is required to arbitrate under ***either*** an estoppel or veil piercing theory. Therefore, if this Honorable Court finds that the Second Circuit's determination on the estoppel issue is not properly raised by the Petition or does not warrant review, SCI's objection to the application of veil piercing is irrelevant because it was not essential to the Second Circuit's holding.

STATEMENT OF FACTS

In July 1993, SCI signed a power purchase agreement ("PPA") with the state-owned utility in the Dominican Republic to construct, finance, and manage an electrical power plant in Puerto Plata. (Joint Appendix ("JA") A157). On November 12, 1993, SCI and Enron International C.V. agreed to create a joint venture to construct, manage, and operate the plant, as reflected in a Project Agreement. (JA A14-A40). On November 24, 1993, Smith Cogeneration Dominicana, Inc. ("Smith Dominicana"), an SCI affiliate, and Travamark Two B.V. ("Travamark"), an Enron affiliate, formed the Smith/Enron Cogeneration Limited Partnership ("SECLP") pursuant to an agreement (the "1993 Agreement" (JA A41-A91)). The 1993 Agreement stated that the purpose of the SECLP was to construct, own, manage, and operate the power plant to be located in Puerta Plata. (JA A53, Art. II ¶ 2.5). The 1993 Agreement also required Smith Dominicana to cause SCI to contribute and assign all of its interest in the PPA with the state-owned utility in the Dominican Republic to SECLP. (JA A57-A58, Art. IV § 4.2).

On May 1, 1994, Smith Dominicana assigned part of its partnership interest in SECLP to SCI, thereby making SCI a party to the 1993 Agreement. (JA A203-A217). Similarly, on December 1, 1993, Travamark assigned its limited partner's interest in SECLP to another Enron affiliate, Atlantic Commercial Finance B.V. (JA A193-A197). On April 15, 1994, Travamark assigned its general partner's interest to Enron Reserve I B.V. (JA A198-A202). Upon assignment, each of the assignees agreed to be bound by the terms and provisions of the 1993 Agreement.

The 1993 Agreement was amended on December 15, 1994 (the "1994 Agreement") (JA A92-A129). The 1994 Agreement reflects the addition of the new partners whose interests had been assigned to them by the original partners to SECLP as reflected above. The partners at this time were Smith Dominicana, SCI, Enron Reserve I B.V., and Atlantic Commercial Finance B.V. *Id.* The 1994 Agreement contains a broad arbitration clause and also provides that "[a]ny arbitration under this Section 11.14 shall for all purposes be governed by, ***and construed and enforced in accordance with, the Federal Arbitration Act ('FAA') and matters of interpretation of the provisions of this agreement shall be governed by Texas law in any such arbitration***." (JA A126, § 11.14(h)) (emphasis added).[2]

The 1994 Agreement was amended on April 30, 1996 (the "1996 Agreement"). (JA A130-A141). The arbitration provisions remained unchanged. (*Id.* § 11.14). At this time, Smith Dominicana Ltd. and an Enron affiliate entered into a Holding Partnership Agreement, which contains arbitration clauses virtually identical to those contained in the SECLP agreements. (JA A188-A190, § 11.20). In June 1998, Smith Dominicana Ltd. and the Enron affiliate submitted to the

---

2. The Project Agreement and 1993 Agreement contain a similar provision:

> [a]ny arbitration under this Article IX(4) [Section 11.14] ***shall for all purposes be governed by, and construed and enforced in accordance with, the Federal Arbitration Act*** ('FAA') and applicable Texas law (except to the extent Texas law conflicts or is inconsistent with the FAA), without giving effect to Texas principles of choice of law.

(JA A37, Art. IX(4)(h); JA A77, § 11.14(h)) (emphasis added).

arbitration of a dispute arising under the Holding Partnership Agreement. At the outset of the arbitration hearing, Smith Dominicana, Ltd. conceded the sole issue in the arbitration. The arbitrator awarded the Enron affiliate $300,000 in attorney's fees on July 8, 1998. This amount has not been paid. (JA A144-A145, ¶ 3).

Obviously disappointed with the result in the arbitration and ignoring the several agreements to arbitrate outlined above, SCI, on July 31, 1998, filed suit in the Dominican Republic against SECLP, Enron Reserve I B.V., Travamark Two B.V., Atlantic Commercial Finance, B.V., and Enron Development (the "Dominican Lawsuit"). In its complaint in that action, SCI alleges that in 1993 it was defrauded and coerced by these companies into becoming a partner in SECLP and assigning its interest in the PPA to SECLP. (JA A145-A146, ¶ 4). In the complaint SCI asks that each of the agreements between it and any of the Respondents be annulled and terminated. The complaint also requests, *inter alia*, $159 million in damages. (*Id.* ¶¶ 4, 5). The filing of the Dominican Lawsuit constituted a failure and refusal by SCI to arbitrate. As a result, the Enron Entities had no choice but to commence this proceeding by filing a petition to compel arbitration and enjoin SCI from further prosecuting the action in the Dominican Republic.

Judge Richard C. Casey of the United States District Court for the Southern District of New York granted Enron's petition in a decision read from the bench on November 6, 1998, and judgment was entered on December 22, 1998. The Second Circuit affirmed Judge Casey's ruling on December 8, 1999, and denied SCI's petition for rehearing with a suggestion for rehearing en banc on February 23, 2000.

I.

FEDERAL LAW GOVERNS THE ENFORCEMENT OF ARBITRATION BETWEEN THE PARTIES

A. Federal Law Dictates That Agreements to Arbitrate be Enforced According to Their Terms

The Second Circuit properly enforced the parties' agreement that federal law applies to the enforcement of arbitration. This Honorable Court has consistently held that privately negotiated agreements to arbitrate are to be enforced according to their terms.[3] The central issue raised in this case is the enforceability of the arbitration clauses in the agreements between the parties. Since SCI agreed that the FAA would apply to the enforcement of arbitration under the relevant agreements, New York choice of law rules and Turks and Caicos law do not even arguably apply. As noted above, the 1994 Agreement contains the following choice of law provision: "[a]ny arbitration under this Section 11.14 ***shall for all purposes be governed by, and construed and***

---

3. *See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58 (1995); *see also* Joseph T. McLaughlin, *Alternative Dispute Resolution in the Corporate Sector*, SDO6 ALI-ABA 1231, 1241-42 (1998) ("[t]he ruling in *Volt* had an immediate impact on every existing and future arbitration agreement .... From that point forward, if a party to a contract containing an arbitration agreement or contractual choice of law provision wanted to avoid possible delays in the courts, the contract had to state explicitly that the parties intended to be bound by federal law applicable to arbitration").

enforced in accordance with, the Federal Arbitration Act, and matters of interpretation of the provisions of this agreement shall be governed by Texas law [only] ***in*** any such arbitration." (*See* JA A126, § 11.14(h); emphasis added).[4] The other agreements between the parties similarly provide that the FAA applies to the enforcement of arbitration.

Federal law determines whether an agreement to arbitrate is enforceable where the parties have agreed to the applicability of the FAA. The FAA "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see Oldroyd v. Elmira Savs. Bank, FSB*, 134 F.3d 72, 76 (2d Cir. 1998) (same). This federal substantive law

---

4. Texas law does not apply to the dispute between the parties. The 1994 and 1996 Agreements provide that Texas law applies only ***in*** arbitration, and the FAA applies to the enforcement of arbitration. Although the arbitration clauses in the Project Agreement and 1993 Agreement refer to both the FAA and Texas law, they expressly exclude Texas principles of choice of law, and the Supreme Court of Texas repeatedly has held that where an agreement provides for the application of both Texas law and the FAA, the FAA prevails. *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 91 (Tex. 1996); *see Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 271 (Tex. 1992) (the FAA preempts all otherwise applicable state laws under the supremacy clause of the United States Constitution, is substantive and is the law of Texas). In any event, as the Second Circuit noted in its Opinion, neither party argued that Texas law applied. Pet. App. 16a. To the extent SCI is now arguing that Texas law applies, *see* Pet. at 12-13, it has waived any such argument. SCI has also waived any argument based on the Rules of Decision Act, which was not mentioned in any prior brief. In any event, there is no support for SCI's assertion that the Rules of Decision Act requires application of the law of the forum in this case.

"comprises generally accepted principles of contract law." *Genesco, Inc. v. T. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 845 (2d Cir. 1987). As stated by the Second Circuit, "[o]nce a dispute is covered by the [FAA], ***federal law applies to all questions of [the arbitration agreement's] interpretation, construction, validity, revocability, and enforceability.***" *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1211 (2d Cir. 1972), *cert. denied*, 406 U.S. 949 (1972) (emphasis added).[5]

B. Federal Law Applies Because this Dispute Implicates the Convention

Federal law applies for the additional reason that the dispute between the parties falls under the Convention. The strong federal policy in favor of arbitration, particularly in the context of international business transactions, compels the application of federal law. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 629-31 (1985) (the Convention makes it clear that "the federal arbitration policy applies with special force in the field of international commerce"); *see David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 248-49 (2d Cir. 1991) (applying federal

---

5. *See Harvey v. Joyce*, 199 F.3d 790, 793 (5th Cir. 2000) (in determining whether the parties agreed to arbitrate their dispute, court applies federal substantive law of arbitrability to any arbitration agreement within the coverage of the FAA); *Letizia v. Prudential Bache Secs., Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986) (because issue of whether nonsignatories were bound by the agreement "involve[d] the arbitrability of a dispute, it is controlled by application of federal substantive law rather than state law"); *Sharon Steel Corp. v. Jewell Coal and Coke Co.*, 735 F.2d 775, 777 n.6 (3d Cir. 1984) ("The ultimate arbitrability of a contract is a matter of federal substantive law").

law in a diversity case because the suit related to international commerce); *Filanto, S.p.A v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1235-37 (S.D.N.Y. 1992) (applying federal law in a diversity case to the question of whether a contract is enforceable in a case arising under the Convention).

In addition, under 9 U.S.C. § 203, the district courts have original jurisdiction over actions falling under the Convention, which are "deemed to arise under the laws and treaties of the United States." Finally, as the Second Circuit noted in its Opinion, in actions brought under the Convention there are:

> compelling reasons to apply federal law, which is already well-developed, to the question of whether an agreement to arbitrate is enforceable. *See David L. Threlkeld & Co.*, 923 F.2d at 249-50 (holding Convention and FAA preempt Vermont statute); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 845-46 (2d Cir. 1987) (applying federal common law in case arising under the Convention); *Borsack v. Chalk & Vermilion Fine Arts, Ltd.*, 974 F. Supp. 293, 299 n.5 (S.D.N.Y. 1997) ("[W]here jurisdiction is alleged under chapter 2 of the Federal Arbitration Act the issue of enforceability and validity of the arbitration clause is governed by federal law").

Opinion, Pet. App. 15a.

C. There is no Basis for Applying New York Law in this Case

Because the arbitration clauses in the agreements between the parties demonstrate that the parties intended that federal law would apply to the enforcement of arbitration, SCI ignores these clauses and instead asserts that: (i) New York choice of law rules apply and in turn point to the law of Turks & Caicos; and (ii) Turks & Caicos law applies because the parties' dispute allegedly implicates the internal affairs of the partnership.[6]

SCI's first argument fails for two reasons. First, SCI is unable to point to a single reference to New York law in any of the relevant agreements. Thus, as the Second Circuit properly found, "it is [ ] clear that neither party intended New York law . . . to govern any aspect of their dispute." Opinion, Pet. App. 16a. Second, since this is a federal question case and not a diversity case, no relevant transactions occurred here and no party is domiciled here, there is no justification for SCI's assertion that New York

---

6. SCI's assertion that the law of Turks & Caicos dictates that an assignor loses right to arbitrate, *see* Petition at 11, is false. Section 6(4) of the Limited Partnerships Ordinance of the Turks & Caicos Islands does not even address this issue (and the Ordinance cited is not the 1992 version referenced in the relevant agreements), and the quotation from the British case cited in the Petition is merely dicta. In addition, SCI's citation to *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank National Ass'n*, 731 F.2d 112 (2d Cir. 1984) for the proposition that an assignor loses the right to arbitrate under New York law, *see* Petition at 11, is irrelevant because: (i) *Aaron Ferer* had nothing to do with arbitration and (ii) SCI is not even arguing that New York substantive law applies.

choice of law rules should apply simply because it is the law of the forum. *See id.*

SCI's second argument is equally without merit. The fact that the 1994 Agreement provides for application of Turks & Caicos law with respect to internal partnership affairs and matters relating to the "organization" of the partnership is irrelevant. Internal partnership affairs and the "organization" of the partnership do not include the arbitrability of contract disputes where the agreements specifically address that issue and provide for the applicability of the FAA. In addition, SCI's argument that its dispute with Enron is an "internal affairs matter," *see* Petition at 10-11, is inconsistent with the fact that the Enron Entities are no longer partners and the fact that SCI is seeking nullification of the agreements.

D. The Second Circuit's Ruling Does Not Conflict with Supreme Court Precedent or Decisions in Other Circuits

The Second Circuit's holding that federal law — and not the law of Turks and Caicos pursuant to New York choice of law rules — determines Enron's right to invoke arbitration does not conflict with Supreme Court or other Circuit Court decisions. None of the cases cited by SCI that applied state choice of law rules involved either the Convention or contractual choice of law clauses providing for the applicability of federal law. In contrast, each of the arbitration agreements between SCI and the Enron Entities ***expressly provide*** that the FAA applies to the enforceability of arbitration — the precise issue in this lawsuit — and SCI no longer contests that this case falls under the Convention. In addition, none of the cases cited by Petitioner applied a

particular state's law merely because it was the law of the forum.

Although each case cited in the Petition is irrelevant because of these important distinctions, many of the cases are either inapposite or do not support SCI's position for additional reasons. For example, SCI's citation to *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), is irrelevant because the issue in that case was whether the Kaplans, who had not personally signed an agreement to arbitrate, had in fact agreed to arbitrate. Here, there is no dispute that the parties entered into several agreements to arbitrate. SCI's citations to *Doctor's Associates Inc. v. Casarotto*, 517 U.S. 681 (1996) and *Perry v. Thomas*, 482 U.S. 483 (1987), are odd because in both cases this Honorable Court reviewed a state court judgment and held that the FAA preempted conflicting state law. SCI's citations to *First Options, Aaron Ferer & Sons Ltd.*, 731 F.2d 112, and *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130 (7th Cir. 1997), are also curious since these courts conducted an interest analysis to determine which law should apply; SCI does not contend that an interest analysis is appropriate. In *Riley Manufacturing Co., Inc. v. Anchor Glass Container Corp.*, 157 F.3d 775, 780 n.5 (10th Cir. 1998), the court applied Florida and Kansas law only because the manufacturing agreement at issue specified Florida choice of law and both parties relied on Kansas law for purposes of the appeal.

In *Atherton v. FDIC*, 519 U.S. 213 (1997), this Honorable Court held that there is no federal common law providing a standard of care for officers and directors of federally insured savings institutions. *Atherton* did not involve arbitration, much less arbitration under the FAA; it merely stands for the proposition that state law prevails if

there is no distinct or conflicting important federal policy or interest. Here, the strong federal policy in favor of arbitration compels the application of federal law.

II.

THE ARBITRATION AGREEMENTS ARE ENFORCEABLE UNDER FEDERAL LAW

The Enron Entities' right to arbitrate any disputes with SCI pursuant to the relevant agreements was not impacted by their assignments of their interests in the partnership. SCI's assertion that the assignments eliminated Enron's right to invoke the arbitration agreements is an attempt to have it both ways. SCI has chosen to sue these same companies in the Dominican Republic, not their assignees, because SCI's dispute is with Enron over precisely the agreements that contain the arbitration clauses. SCI cannot sue these entities over these agreements and at the same time claim that the dispute resolution mechanism in these very agreements is moot. Moreover, SCI seeks, in part, nullification of these agreements. Since the claims in the Dominican Lawsuit arose from actions that took place well before the Enron entities assigned their interests in the SECLP partnership to their affiliates, the broad arbitration agreements between the parties govern their disputes.

Applying federal law, the Second Circuit properly found that even if it accepted SCI's assertion that the Enron Entities are non-signatories to an arbitration agreement with SCI, arbitration is appropriate. Courts recognize five theories for binding non-signatories to arbitration agreements according to "ordinary principles of contract and agency," including estoppel and veil-piercing. *See* Opinion, Pet. App. 16a-17a;

Thomson-CSF, S.A. v. American Arbitration Ass'n., 64 F.3d 773, 776 (2d Cir. 1995); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993); *McAllister Bros., Inc. v. A & S Transp. Co.*, 621 F.2d 519, 524 (2d Cir. 1980).

Estoppel is warranted where, as here, a signatory to an arbitration agreement attempts to resist the arbitration of claims against a non-signatory which are "intimately founded in and intertwined with the underlying contract obligations." *See Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993), *cert. denied*, 513 U.S. 869 (1994). Under the estoppel theory, a signatory to an arbitration agreement can be compelled to arbitrate at the insistence of a non-signatory where the claims to be resolved in arbitration are "intimately founded in and intertwined with the underlying contract obligations." *McBro Planning & Dev. Co. v. Triangle Elec. Constr. Co.*, 741 F.2d 342, 344 (11th Cir. 1984). The Fourth and Eleventh Circuits have estopped a signatory from avoiding arbitration with a non-signatory under these circumstances. *See Sunkist*, 10 F.3d 753; *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988); *McBro Planning*, 741 F.2d 342. In each of these cases, the signatories had entered into arbitration agreements with entities closely related to the parties asserting arbitration. Similarly, SCI conceded in its principal brief to the Second Circuit that it is a party to a "living" arbitration agreement with affiliates of the Enron respondents. *See* Brief for Respondent-Appellant at 10.

It is undisputed that SCI (and its affiliate) signed broad arbitration agreements with the Enron Entities encompassing "***any dispute***, disagreement, controversy, or claim arising under or ***relating to any obligation or claimed obligation***

under the provisions of this Agreement." (JA A35-A37, Art. IX(4)(a); JA A125-A126, § 11.14; JA A75-A77, § 11.14; JA A130-A141) (emphasis added). Since SCI indicated its willingness to arbitrate with each of the Enron Entities at some point, there is an even greater justification for applying estoppel here than was the case in *Sunkist*, *J.J. Ryan*, and *McBro Planning*.

SCI alleges in the Dominican Lawsuit that it was defrauded and coerced by Enron into becoming a partner in SECLP. It also requests nullification or rescission of the agreements between SCI and its related companies and the "Enron Group." (JA A145-A146, ¶¶ 4, 5). Given the nature of SCI's claims against Enron, there can be no question that the claims are closely related to Enron's obligations or claimed obligations under the agreements containing arbitration clauses. *See E.G.L. Gem Lab Ltd. v. Gem Quality Inst. Inc.*, No. 97 Civ. 7102 (LAK), 1998 WL 314767, at *3 (S.D.N.Y. June 15, 1998) (granting non-signatory's demand for arbitration against a signatory because of the tight nexus between the claims raised and the claims arising under the agreement containing the arbitration clause).[7]

The Second Circuit also correctly determined that the particular circumstances present here justify allowing Enron to invoke arbitration under the agreements. As noted in the Opinion, even SCI refers to the related Enron companies in its complaint in the Dominican Lawsuit as the "Enron Group," "affiliates," and "Enron," as "though they were

---

7. We note that the Second Circuit properly determined that SCI is estopped from avoiding arbitration as a matter of law. The *Sunkist* court observed that the issue of whether the signatory is estopped from contesting the non-signatory's standing to invoke the clause is a question of law. *Id.*

interchangeable." Pet. App. 18a. In addition, because it is the Enron Entities that are requesting arbitration, a court need not be "wary of imposing a contractual obligation to arbitrate on a non-contracting party." *Id.* at 17a. As noted above, however, the Court's determination on this issue was not necessary to its holding.

Since the Enron Entities and SCI ***are*** signatories to arbitration agreements encompassing the dispute in the Dominican Lawsuit, there are additional bases under federal substantive law for compelling arbitration despite the assignments among Enron affiliates. These arguments were set forth in Enron's briefs to the Second Circuit. They were not addressed in Second Circuit's Opinion because the Court found that SCI should be compelled to arbitrate even if the Court accepted SCI's argument that the Enron Entities should be treated as non-signatories. Since we believe that these arguments provide an alternative basis for the Second Circuit's ruling, we repeat them here.

In *Vainqueur Corp. v. Lamborn & Co.*, 305 F. Supp. 1007, 1008 (S.D.N.Y. 1969), the court granted a petition to compel arbitration of a dispute arising from respondent's refusal to pay certain freights claimed to be due under an agreement even though petitioner irrevocably assigned its right to receive payment for those freights.

The court found that, despite the assignment, petitioner was still a "party aggrieved" under § 4 of the FAA by the failure of respondent to arbitrate and noted:

> When there is a specific written agreement to arbitrate any dispute that may arise out of an agreement, and one of the parties to that

> agreement fails to comply with its terms, ***the other party is entitled to an order compelling arbitration even if that party has irrevocably assigned its rights under the agreement.***

Id. (emphasis added). Thus, Enron is "aggrieved" by SCI's failure to arbitrate and is entitled to an order compelling arbitration despite the assignments.[8]

In addition, the Second and Fifth Circuits have both permitted the arbitration of a dispute between a party that has assigned its rights under a contract and the other party to the original agreement without commenting on the fact that an assignment was made. *See Lachmar v. Trunkline LNG Co.*, 753 F.2d 8 (2d Cir. 1985) (assignee of a shipping company's rights under a contract was not an indispensable party to an arbitration between the assignor shipping company and the other party to the contract, the shipper);[9] *Tenneco Resins, Inc. v. Davy Int'l, A.G.*, 770 F.2d 416, 417, 422 (5th Cir. 1985) (directing district court to enter an order staying litigation pending arbitration under the contract

---

8. SCI cannot have it both ways. It cannot commence an action containing claims for fraud and fraudulent inducement against the assignors of agreements in connection with the assigned agreements and at the same time ask this Honorable Court to ignore the arbitration clauses of those very agreements which provide the appropriate means to resolve precisely those claims.

9. The court in *Lachmar* applied New York law with respect to an assignee's duty to arbitrate because, as a related case notes, Trunkline LNG Company and Lachmar "expressly provided that New York law would govern [their 1996] Transportation Agreement" — the same agreement at issue in the *Lachmar* case. *United States v. Panhandle Eastern Corp.*, 693 F. Supp. 88, 95 (D. Del 1988).

between appellant and appellee even though appellee's "rights and obligations under this contract were subsequently assigned to" another party).

Further, termination of a contract does not extinguish a party's rights and duties under an arbitration clause contained in a contract. This Honorable Court has held that a claim that involves facts and occurrences which arose before expiration of an agreement, can be said to arise under the contract and thus is arbitrable. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 205-06 (1991); *see Monroe Sander Corp. v. Livingston*, 377 F.2d 6, 10 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967) (arbitration clause ordinarily survives expiration of the agreement that contains it and governs any dispute that arises out of the agreement).

Courts in the Second Circuit uniformly compel arbitration where a dispute involves facts and circumstances that arise before termination or expiration of an agreement. *See, e.g., American Diagnostica of Connecticut, Inc. v. Centerchem, Inc.*, No. 94 Civ. 7047 (DC), 1996 WL 71494, at *4 n.2 (S.D.N.Y. Feb. 20, 1996); *Acquaire v. Canada Dry Bottling*, 906 F. Supp. 819, 832-33 (E.D.N.Y. 1995) (expiration of distributor's agreement had no bearing on the arbitrability of plaintiffs' causes of action, which arose from events that occurred prior to expiration); *Insta-Bulk, Inc. v. Powertex Inc.*, 764 F. Supp. 52, 53-54 (S.D.N.Y. 1991) (rejecting defendant's argument that the arbitration clause of a license agreement could no longer be invoked because defendant had terminated the agreement, since "obligations to arbitrate can survive contract expiration," and directing parties to promptly invoke arbitration procedure). Here, since the events giving rise to the dispute in the Dominican Lawsuit occurred prior to both the termination by assignment of the

relationship between the parties as partners in the SECLP partnership and the superceding of the earlier agreements, all of SCI's claims are arbitrable.

Moreover, since the language of the arbitration clauses is broad and does not contain any temporal limitations, the strong federal policy in favor of arbitration requires that SCI be compelled to arbitrate the claims made in the Dominican Lawsuit. *See Butchers, Food Handlers & Allied Workers Union v. Hebrew Nat'l Kosher Foods, Inc.*, 818 F.2d 283, 287 (2d Cir. 1987) ("If the contract does not state that the duty to arbitrate ends with the termination of the contract, the strong policies favoring arbitration should ordinarily lead the court to conclude that the obligation to arbitrate — especially as to claims that accrued during the term of the contract — survives the expiration of the contract"); *Coenen v. R.W. Pressprich & Co.*, 453 F.2d at 1212 (arbitration applied to actions predating the signing of the contract by the petitioner because the contract stated that it governed "any controversy" between the parties).[10] As the Second Circuit stated in its Opinion, "the relevant inquiry is whether SCI's claims 'relat[e] to any obligation or claimed obligation

---

10. As stated by this Honorable Court, "the parties' failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship." *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243, 255 (1977); *see AT&T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986) (quoting *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-585 (1960)) ("[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail").

under' the 1994 agreement, not when they arose. We think it is evident that SCI's claims in the Dominican Lawsuit fall within this broad language." Pet. App. 21a.

Since an arbitration clause survives the agreement containing it under federal law absent a termination provision plainly specific to the arbitration clause, the arbitration agreements between Enron and SCI survived any assignment or superceding agreement. *See Dobson v. Counsellors Secs., Inc.*, No. 94-CV-73942-DT, 1995 WL 871004, at *6 (E.D. Mich. Sept. 13, 1995) (citing *United Steelworkers of America*, 363 U.S. at 584-85).

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

GREGORY MARKEL
Counsel of Record
RONIT SETTON
BROBECK, PHLEGER & HARRISON LLP
Attorneys for Respondents
1633 Broadway, 47th Floor
New York, New York 10019
(212) 581-1600